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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DEANDRE LABAR BROWN,

Defendant and Appellant.

F075004

(Super. Ct. No. BF160898A)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Colette M. Humphrey and Michael E. Dellostritto, Judges.[†]

Tutti Hacking and Paul Kleven, under appointments by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Keith P. Sager, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Franson, Acting P.J., Peña, J. and Smith, J.

[†] Judge Humphrey presided over appellant's plea hearing and sentenced appellant; Judge Dellostritto presided over and denied appellant's suppression motion.

INTRODUCTION

Appellant Deandre Labar Brown pled no contest to possession of a firearm by a felon, a violation of Penal Code¹ section 29800, subdivision (a)(1), after his motion to suppress evidence was denied. Brown contends the trial court erred in denying his suppression motion. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Because Brown pled to the offense, the facts are taken from the August 11, 2016, suppression hearing.

An information filed on February 17, 2016, charged Brown in count 1, with possession of a firearm by a felon; in count 2, with carrying a loaded firearm in a vehicle in a public place; in count 3, with active participation in a criminal street gang; and in count 4, with receiving stolen property. It also was alleged that counts 1 and 4 were committed for the benefit of a criminal street gang. Further, as to each count, it was alleged that Brown had suffered a prior strike conviction, a prior serious felony conviction, and had served a prior prison term.

On June 28, 2016, Brown filed a motion to suppress evidence pursuant to section 1538.5. The motion alleged that Brown was unlawfully detained and the impound and search of his vehicle was illegal. The People filed written opposition to the motion to suppress on July 7, 2016. In their opposition, the People argued officers had reasonable suspicion to detain Brown; the detention was not unduly prolonged; and officers conducted a lawful inventory search of Brown's vehicle.

The suppression hearing was held on August 11, 2016. Bakersfield Police Officer James Montgomery testified he was patrolling the 800 block of R Street with his partner, Officer Nicholas Benavente, around 6:10 p.m. on July 23, 2015. Montgomery was a member of the Gang Task Force Unit and he observed "several subjects" with whom he

¹ References to code sections are to the Penal Code unless otherwise specified.

was familiar “wearing traditional gang colors.” They were gathered in front of a residence located on R Street.

Montgomery ran a records check of the R Street address, which revealed that a Keon Brackenridge at that address was on probation. Montgomery called for additional officers from the Special Enforcement Unit. After backup arrived, officers headed toward the group of men. As officers approached, Brown and another man, Trevon Whatley, broke away from the group and headed toward the front door of the residence.

Montgomery noticed the pistol grip of a firearm protruding from Whatley’s right pocket. After seeing the firearm, Montgomery believed, “[i]t was important to grab these two because they were distancing themselves from the group. And it was an officer’s safety issue.” Benavente “took control” of Whatley and Montgomery “took control” of Brown. Brown was detained because he was “within one foot” of Whatley and Montgomery was not sure if Brown “possibly had a firearm on him, as well.”

Benavente put his hand on Whatley’s pocket and felt the “outline of a semiautomatic firearm.” The firearm was a Ruger .40-caliber semiautomatic pistol, of which Benavente took possession. Montgomery ran a records check of the serial number on the Ruger and found it had been stolen.

After finding the Ruger on Whatley, officers searched the other individuals there for weapons and sat them on the sidewalk in front of the residence. Officers then conducted a records check of each person on the scene, which took approximately 15 minutes. Montgomery conducted the pat search of Brown, after which Brown was placed in handcuffs. Montgomery testified he believed Brown to be involved in the criminal activity of “[c]onspiracy, gang member with a firearm in public, gang charges.”

Montgomery subsequently was informed that Brackenridge was incarcerated in state prison and no longer residing at the residence. Montgomery and the officers did not enter the residence.

Officer Michael Malley arrived at the scene to assist with the investigation. When he arrived, there was a gray Buick parked in a way that obstructed traffic; the rear of the car was protruding six or seven feet into the roadway. Malley felt the vehicle was creating a traffic hazard, so he impounded the Buick.

An officer located the keys to the Buick in Brown's pocket and gave the keys to Malley. Malley conducted an inventory search of the Buick, according to department protocol. Among the items in the Buick was a loaded Desert Eagle .40-caliber handgun and several items of clothing "that could be described as Westside Crips gang clothing." A records check of the Desert Eagle's serial number revealed that it had been stolen.

Brown was in handcuffs by the time Malley arrived at the scene. Malley believed Brown's detention became an arrest sometime after he arrived at the scene, but before the search of the Buick. Malley testified he would never allow a gang member to move their own car under the circumstances at the scene because "[t]here maybe guns in the car. It would be a horrible officer safety mistake."

Montgomery did not see the keys to the Buick being removed from Brown's pocket. He was not the arresting officer and believed that Malley placed Brown under arrest. When asked why Brown was detained past the 15 minutes it took to conduct a records check, Montgomery responded that officers had to conduct interviews and an investigation, and no one is released until after that is completed. Montgomery estimated Brown had been detained about 30 to 40 minutes before the Buick was searched. The entire investigation took approximately one hour.

Brown presented defense witnesses at the suppression hearing. Monte Wilson testified Brown had called him to "shoot an album cover" and then he decided to stay and "shoot this scene for my movie." Wilson drove to the residence, parked his car behind Brown's vehicle, and set up his movie equipment. He had been on the scene about 45 minutes when police arrived.

Wilson testified that police stated they were there to conduct a probation search. Brown told officers no one was on probation and officers could not search them. Brown's aunt was "going to go back into the house" when police arrived. Whatley tried to go into the house before he was stopped by police.

Wilson testified he was filming events at the scene and recorded an officer pointing a Taser at Brown. Wilson was arrested at the scene and his camera was taken. The footage was missing when the camera was returned.

According to Wilson, Brown told officers they could not search his car. Wilson stated officers told Brown, "[w]e are going to search it anyway because it's parked illegally," or words to that effect. Wilson also heard officers state that they were going to tow Brown's car. Wilson claimed officers told Brown, " '[i]f we tow your car, we can search it.' "

Wilson maintained the clothing in the Buick was going to be used for the photo shoot, but never mentioned this to police at the scene. Wilson was not aware that Whatley had a gun, or that gang members were present. He did not know whether Brown was a gang member.

Wilson initially denied that Brown had appeared in any of his prior videos, but later acknowledged that Brown had appeared in a video entitled, "Dying Broke." Guns were part of the "Dying Broke" video.

Brown's aunt, Denisa Dixon, lived at the R Street residence and was home when Brown was arrested. A fence surrounded her front yard. The day officers arrived, Dixon was outside reading Brown a letter. Dixon went inside the house and officers knocked on her door. The officers announced they were there to conduct a parole search of her son, Brackenridge. Dixon told them Brackenridge was in Wasco State Prison.

Dixon estimated it was "15 or more" minutes after officers arrived that they searched Brown's car. Dixon did not see anyone pointing a Taser at Brown.

Dwayne Taylor was one of those detained by police, handcuffed, and seated at the curb. Taylor testified the officers asked everybody who owned the Buick and they searched everybody. When officers got to Brown and asked him about the car, Brown did not respond. An officer reached into Brown's pocket and retrieved the keys to the car. Brown repeatedly told officers they could not search his car. Taylor estimated they had been seated on the curb about 10 or 20 minutes before officers obtained the keys to the Buick.

After the presentation of evidence concluded, the parties argued the motion. The trial court took the matter under submission and indicated it would issue a written ruling.

The trial court issued its written ruling on August 17, 2016, denying the motion to suppress. The trial court found that Montgomery recognized at least three gang members among those gathered at the R Street residence. "Consistent with his duties of gang suppression, he runs the address and discovers it is that of a probationer subject to search. The court finds he had a good faith belief in his right to conduct a probation search of the residence at the time." The trial court found that, "[c]onsequently, the officers had a right to be where they observed the subsequent events."

The trial court further found that the pistol in Whatley's pocket was "substantially concealed" when Montgomery observed the butt of the pistol; the pistol was wholly concealed when Whatley "stuffed into his pocket" the pistol butt. The concealment of a firearm on one's person is a crime under section 25400, subdivision (a)(2). There were reasonable grounds to detain and arrest Whatley.

As for the detention of Brown and the others, the trial court found that there was a large gathering of people, outnumbering the police, several were gang members, and one was armed. The trial court concluded that "[u]nder the totality of the circumstances, there was reasonable suspicion to detain others present, including [Brown], and conduct pat down searches for weapons and investigate further. This is what occurred with the

defendant and apparently everyone else being cuffed and moved to the front of the residence. No weapons were located on the defendant and he was seated on the curb.”

The trial court found, however, that Brown’s “detention was unduly prolonged and the defendant was arrested prior to the search of his person for the keys. He was cuffed and detained for arguably [four] times the amount of time necessary to complete the investigation into his involvement. Handcuffing combined with a prolonged detention amounts to an arrest.” The trial court also found that a prolonged detention does not automatically result in exclusion of evidence.

The trial court found that there was a gathering of gang members and/or associates, and Brown and Whatley “appeared to be moving in concert toward the residence to seemingly avoid the police.” As they are moving away, Whatley attempts to further conceal the handgun in his pocket. “These observed facts in conjunction with the officers[’] knowledge of the workings of gangs, being a member of the gang task force, provided probable cause to arrest defendant as an aider and abettor” to a violation of section 25400, subdivision (a)(2), carrying a concealed firearm; and possible violations of section 25850, subdivision (c)(3), gang member carrying a loaded firearm in public, and section 186.22, subdivision (a), active participation in a criminal street gang. “Consequently, the court finds that the defendant was lawfully arrested and his person was searched and the keys located incident to arrest.”

The trial court also found that based upon photographs of the scene, Brown’s car was “illegally parked and protruding out into the street several feet.” An officer may remove a vehicle that is parked or left “standing ... in a position so as to obstruct the normal movement of traffic or in a condition so as to create a hazard to other traffic.” Impounding Brown’s car served a “community caretaker function.” The trial court concluded that impounding Brown’s car under the circumstances was constitutionally reasonable under the community caretaker function and the inventory search was lawful.

Subsequently, on August 19, 2016, Brown signed a felony advisement of rights, waiver, and plea form. In the plea form, Brown agreed to plead to count 1, a violation of section 29800, subdivision (a)(1), in exchange for dismissal of all other counts and enhancements, including the prior strike allegation. Brown was to receive an agreed upon two-year sentence.

The trial court imposed a two-year sentence on January 11, 2017, in accordance with the plea agreement. Brown filed a notice of appeal on January 12, 2017, appealing from the denial of his motion to suppress.

DISCUSSION

Brown contends the trial court erred in denying his motion to suppress. Specifically, he contends the initial detention was unlawful; the detention was unduly prolonged and constituted a de facto arrest; the search of his person was unlawful; and the search of the vehicle was unlawful.

Standard of Review

“The standard of review on a motion to suppress is well established. The appellate court views the record in the light most favorable to the ruling and defers to the trial court’s factual findings, express or implied, when supported by substantial evidence. But in determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, the appellate court exercises its independent judgment. [Citations.] Appellate review is confined to the correctness or incorrectness of the trial court’s ruling, not the reasons for its ruling.” (*People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1011.)

Our review defers to the trial court’s factual findings and independently applies the requisite legal standard to the facts presented. (*People v. Celis* (2004) 33 Cal.4th 667, 679 (*Celis*).) “We review the court’s resolution of the factual inquiry under the deferential substantial-evidence standard.” (*People v. Saunders* (2006) 38 Cal.4th 1129, 1134 (*Saunders*).) We then independently apply the requisite legal standard to the facts

presented. (*Celis, supra*, at p. 679.) We accept the trial court's assessment of the testifying officers' credibility. (*People v. Tully* (2012) 54 Cal.4th 952, 979.)

The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures by law enforcement personnel. "The prosecution always bears the burden of justifying, by a preponderance of the evidence, that a warrantless search or seizure falls within a recognized exception to the warrant requirement." (*People v. Gutierrez* (2018) 21 Cal.App.5th 1146, 1152.)

Detention

Brown contends his detention was unlawful. The trial court determined that the detention of Brown was lawful. We agree. There was a reasonable suspicion that Brown may have been involved in illegal activity.

A detention requires that an officer have a reasonable suspicion that the person detained may be involved in criminal activity. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.) Montgomery's testimony provides substantial evidence that Brown and Whatley distanced themselves from the group while Whatley was carrying a concealed firearm, a violation of section 25400, subdivision (a)(2). Montgomery, who was a member of the Gang Task Force Unit, observed a group of people wearing "traditional gang colors" and recognized three people in the group as gang members. As Montgomery approached the group, he saw Brown and Whatley leave the group and walk toward the residence together. Montgomery then saw a pistol butt protruding from Whatley's pocket and saw Whatley push the gun butt further into his pocket to completely conceal the firearm.

At this point, Montgomery knew that Whatley was engaged in criminal activity; carrying a concealed weapon in violation of section 25400, subdivision (a)(2). It gives rise to a reasonable suspicion that Brown, who had broken from the group with Whatley and was walking next to him, also was engaged in criminal activity because Brown might

have distanced himself from the group because he, too, was carrying a concealed firearm. Alternatively, Brown could be aiding Whatley in avoiding detection and arrest by the police.

Furthermore, Montgomery testified there were several people in the group wearing gang clothing and he recognized three as gang members, including Whatley. Whatley's possession of a concealed weapon in the presence of known gang members, and Brown's presence in the group, also provides grounds for a reasonable suspicion that Brown was involved in the criminal activity of active participation in a criminal street gang in violation of section 186.22, subdivision (a).

Additionally, when Montgomery observed a group of gang members gathered at the location, he "plugged" the address into the "CJIS database system" and was notified a person on probation lived at that address. Although Montgomery later received information indicating the probationer no longer resided at that address, Montgomery's and the other officers' initial entry onto the property was in good faith.

Brown's reliance on *People v. Strider* (2009) 177 Cal.App.4th 1393 is misplaced. In *Strider*, the defendant was in his fenced yard and was carrying a gun. The officer chased the defendant into his home, where the officer saw the defendant drop a baggie of cocaine. (*Id.* at pp. 1396-1397.) The only basis for the officer's initial action in entering the fenced yard to detain the defendant was the suspected crime of carrying a loaded firearm "while in any public place." (*Id.* at p. 1400.) The court in *Strider* found that the fenced yard was not a public place and concluded there was no basis to detain the defendant. (*Id.* at p. 1408.)

Carrying a loaded weapon in public is not the same offense as carrying a concealed weapon. (See *People v. Hall* (2010) 183 Cal.App.4th 380, 386 [offense of carrying a loaded weapon in a public place is not a lesser included offense of carrying a concealed weapon because the offense of carrying a concealed weapon contains no public

place requirement].) Here, Whatley was carrying a concealed weapon as he walked away from the group with Brown, which prompted Montgomery to detain the two.

Brown argues that there was conflicting evidence which differed from Montgomery's testimony on some points and therefore, he contends substantial evidence does not support the trial court's findings on the detention. Conflicting evidence is irrelevant because we must accept the trial court's finding that Montgomery was a credible witness. (*People v. Tully, supra*, 54 Cal.4th at p. 979.) Montgomery's testimony alone provides substantial, credible evidence supporting the trial court's finding that the initial detention was justified. (*Saunders, supra*, 38 Cal.4th at p. 1134.)

Having found that substantial evidence existed in the form of Montgomery's testimony that specific facts and circumstances gave rise to a reasonable suspicion Brown was engaged in criminal activity, we conclude the initial detention was lawful. (*Celis, supra*, 33 Cal.4th at p. 679.)

Prolonged Detention and Arrest

Brown argued his detention was unduly prolonged and became a de facto arrest. The trial court so found. The People argue Brown's detention was not unduly prolonged under the circumstances.

The exact duration of Brown's detention is unclear. Taylor, one of those present in the group, testified that Brown's car was searched about 10 to 20 minutes after officers seated Taylor at the curb. Brown's aunt testified that officers searched Brown's car 15 minutes or more after arriving at the scene. Montgomery testified Brown was detained about 30 to 40 minutes before his car was searched.

Nine people were detained at the scene. Presumably a patdown and records check was conducted on all nine individuals. Officers also had to conduct a records check of the firearm found on Whatley. Assuming a detention period of 40 minutes means that officers spent less than five minutes per individual to accomplish a patdown and records

check and there is no indication that officers were not proceeding diligently. We agree with the People that under the circumstances of this case, the length of the detention was not unduly prolonged and was a reasonable amount of time when dealing with nine individuals, several of whom were known gang members, and a stolen firearm. (See *Gallegos v. City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 991 [45-minute detention]; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1517 [30-minute detention of one individual]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 384-385 [30-minute detention].) The handcuffing of an individual does not necessarily convert the detention into a de facto arrest. (*People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062.)

Regardless of whether the detention was unduly prolonged and became a de facto arrest, officers had probable cause to arrest Brown. “Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1037.) An officer’s prior experience is relevant to a determination of probable cause. (*People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742.)

Montgomery was a member of the Gang Task Force Unit and knew Brown had a gang moniker and a gang tattoo. Montgomery observed Brown and other individuals he knew to be gang members gathered in a group. One of those gang members, Whatley, was spotted with a firearm that he pushed into his pocket to fully conceal the weapon. Brown and Whatley separated from the group and moved toward the house together, indicating circumstantially that Brown was attempting to help Whatley avoid detection with a concealed weapon in his possession.

As the trial court found, these facts provided probable cause to arrest Brown for the substantive offense of active participation in a criminal street gang (§186.22,

subd. (a)) and as an aider and abettor to the offense of carrying a concealed weapon (§ 25400, subd. (a)(2)). The California Supreme Court noted:

“[S]ection 186.22(a) defines a substantive gang offense, setting forth the elements of that offense.... Those elements are ‘actively participat[ing] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity’ and ‘willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.’ (§ 186.22(a).)” (*People v. Robles* (2000) 23 Cal.4th 1106, 1115.)

Consequently, any prolonged detention that constituted a de facto arrest was supported by probable cause that Brown was guilty of a crime. An action is reasonable under the Fourth Amendment, regardless of the individual officer’s state of mind, as long as the circumstances, viewed objectively, justify the action. (*Brigham City v. Stuart* (2006) 547 U.S. 398, 404.)

Search of Person and Vehicle

Brown contends the search of his person and his vehicle was unlawful. We disagree.

The keys to the car were found in Brown’s pocket. The search of Brown’s pocket can be justified for officer safety purposes; he was in the company of a gang member carrying a concealed weapon in a pocket and officers justifiably could conduct a search of Brown’s pocket to be sure he did not have a weapon. A limited protective search may be conducted whether or not there is probable cause to arrest. (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1074.) Additionally, the search of Brown’s pocket can be justified as a search incident to arrest; even a minor criminal offense punishable by a fine can support a custodial arrest and search incident to arrest. (See *People v. Redd* (2010) 48 Cal.4th 691, 721; *People v. McKay* (2002) 27 Cal.4th 601, 606-619.)

The People do not contend that officers could search Brown's car incident to his arrest. The People contend Brown's car was impounded and an inventory search was conducted.

Brown's car was parked in a location that obstructed normal movement of traffic. Officers were authorized to impound Brown's car because it was parked in violation of the Vehicle Code. (Veh. Code, §§ 360, 22651, subd. (b).) Officers were not required to ask Brown to move the vehicle; such a request would have placed officers at risk. When an inventory search is conducted based upon a decision to impound a vehicle, we focus on the purpose of the impound, rather than the purpose of the inventory. (*People v. Williams* (2006) 145 Cal.App.4th 756, 761 (*Williams*).) Here, there was a valid purpose for impounding Brown's car; it was not for the sole purpose of furthering a criminal investigation.

Officers can impound vehicles that jeopardize the efficient movement of vehicular traffic as part of their community caretaking function. (*Williams, supra*, 145 Cal.App.4th at p. 761.) In this case, Malley repeatedly stated that Brown's car was parked in a position that obstructed traffic; Malley maintained he would have impounded the vehicle because it was obstructing traffic regardless of whether he observed gang clothing inside the vehicle. Malley's testimony established that Brown's car was being validly impounded pursuant to the Vehicle Code, and the trial court so found. This testimony satisfies any community caretaking function requirement.

The trial court also found that Malley impounded the vehicle and conducted an inventory search in accordance with department procedures requiring anything of value be documented. When the impound is legally warranted, an inventory search of the vehicle pursuant to standardized procedures is constitutionally reasonable. (*Williams, supra*, 145 Cal.App.4th at p. 761.)

Brown's reliance on *People v. Torres* (2010) 188 Cal.App.4th 775 is misplaced. In *Torres*, the deputy's testimony revealed that a decision to impound the vehicle was a pretext to look for incriminating evidence. (*Id.* at pp. 786-793.) Impounding a vehicle as a pretext to further a criminal investigation does not serve a community caretaking purpose. (See *Williams, supra*, 145 Cal.App.4th at p. 763.)

Conclusion

Our review of the evidence discloses that substantial evidence supports the trial court's factual findings. (*Saunders, supra*, 38 Cal.4th 1129 at p. 1134.) The factual findings support the conclusion the detention, any de facto arrest, and the vehicle search did not violate the Fourth Amendment. (*Celis, supra*, 33 Cal.4th at p. 679.) Consequently, the trial court did not err in denying Brown's motion to suppress.

DISPOSITION

The judgment is affirmed.